UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD[1]
REGION 20

Aerotek, Inc.
Employer

and 20-RC-18169

International Brotherhood of
Electrical Workers, Local 1245
Petitioner

SUPPLEMENTAL DECISION ON OBJECTIONS

Pursuant to a Decision and Direction of Election that I issued on January 30,[2] an election by secret ballot was conducted on February 29 among the employees in the following appropriate collective-bargaining unit:

> All full-time and regular part-time technicians employed by the Employer at the 2911 Laguna Blvd.,[3] Building B, Elk Grove, California facility, excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

Upon conclusion of the ballot count on February 29, the Board agent who conducted the election served upon the parties a copy of the official Tally of Ballots that showed that of approximately 50 eligible voters, 25 cast ballots for Petitioner and 18 voted against representation. There were no void or challenged ballots. On March 7, the Employer timely filed Objections to the Election, a copy of which has been served on Petitioner.

Objection No. 1 states:

1. The election in this matter was conducted in an inappropriate bargaining unit, the Region having improperly excluded the Employer's Material

[1] Also referred to as the Board.
[2] All dates refer to 2008 unless otherwise specified.
[3] According to the transcript, the Parties stipulated during the pre-election hearing that the address of the facility on Laguna Blvd. was 2511, and subsequent references reflected that error. The Board agent nevertheless found the facility, and the bargaining unit employees, at 2911 Laguna Boulevard. The Parties have since confirmed that the 2911 Laguna Blvd. is accurate, and I hereby correct the unit description.

> Handlers from the unit, and prevented them from voting in the election, pursuant to the Regional Director's Decision and Direction of Election dated January 30, 2008.

Analysis:

In support of Objection No. 1, the Employer named two witnesses who already had testified on its behalf at the pre-election hearing. Because the Employer made no representation about the nature of the proposed witnesses' expected testimony, I have assumed that they would testify as they did at that hearing The Employer also submitted various exhibits and its post-hearing brief.

The pre-election hearing in this matter proved necessary because Petitioner sought to represent a bargaining unit composed of the Employer's technicians. The Employer posited that the only appropriate bargaining unit had also to include its material handlers. As reflected in my Decision and Direction of Election in this matter, I fully considered and carefully assessed the evidence developed at the pre-election hearing. On pages 11-12 of my Decision, I concluded as follows:

> There are, however, as set forth above, significant differences between the technicians and the material handlers: in the actual work they perform; the lack of any employee interchanges between the technicians and material handlers; their lack of regular common supervision; as well as these employees' differing training and skills levels. Thus, I conclude that the technicians have their own separate and distinct community of interest.
>
> It must be stressed that the inquiry herein is not whether a petitioned-for unit of employees including both the technicians and the material handlers is appropriate, or whether it is the most appropriate unit. Rather the inquiry is whether the unit sought by the Petitioner, which includes only the technicians, is so arbitrary that it cannot constitute an appropriate unit without the inclusion of the material handlers. A unit that includes the material handlers would arguably constitute an appropriate unit (*see*

> *footnote below*[4]*)*, based on some of the community of interest factors they share that are discussed above. I find, however, that in light of the significant differences between these classifications on which I have elaborated, an appropriate unit need not include the material handlers. Accordingly, I find that the petitioned-for unit of technicians is an appropriate unit.

The Employer disagreed with my conclusion and on February 13, exercised its right to request that the Board review it. By Order dated February 28, the Board denied the Employer's Request for Review, judging that it raised no substantial issues. In short, the Board upheld my determination that the petitioned-for unit of technicians constituted a unit appropriate for collective bargaining, and that technicians' community of interest with material handlers was not sufficiently close to compel inclusion of the latter in that unit. I find nothing in the Employer's submission in support of this Objection that dissuades me from my earlier determination. Accordingly, I conclude that the election was conducted in an appropriate unit, and I overrule Objection No. 1.

Objection No. 2 states:

> 2. The election in this matter was conducted in an inappropriate bargaining unit, and in violation of the provisions of the National Labor Relations Act and the Board's Rules and Regulations, the Region having improperly excluded the Employer's Material Handlers from the unit, and prevented them from voting in the election, and the Employer having been denied its right to a lawful and effective review of the Regional Director's Decision and Direction of Election, the Board having failed to lawfully, properly or effectively consider or act upon the Employer's February 13, 2008 Request for Review, and reverse its Regional Director's Decision, in that the Board acted without and in excess of its authority and jurisdiction in forming the two member "panel" which considered the Request, and "delegating" its authority to consider the Request to that two member "panel," and in that the two member panel that considered the Request for Review was improperly constituted, and acted without and in excess of its authority, all in violation of Section 3(b) of the Act, 29 U.S.C. § 153(b).

[4] Footnote 5 in the Decision states, "I make no findings in this regard, but note this observation for

Analysis: The footnote in the Board's Order denying the Employer's Request for Review states that,

> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

The Employer objects that the Board lacked authority to effect this delegation. In support of Objection No. 2, the Employer reiterated the evidence that it cited in support of Objection No. 1 and also submitted the Board's December 28, 2007, *Press Release* announcing the Board's temporary delegation of litigation authority and intent to issue decisions with two Members. The Employer proposed as witnesses former and current Members of the Board and the former Chairman, or proposed in the alternative that I take judicial notice of the action described in the referenced *Press Release*. I hereby do so.

The *Press Release* states,

> The Board acted pursuant to Section 3(b) of the Act, which provides that
>
> > [t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right or the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.
>
> In addition to the statutory language, the Board relied on the legal analysis and

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expository purposes only."

> U.S. Circuit Court precedent set forth in the March 4, 2003 opinion issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained."
>
> The Board has historically relied on this reasoning where one member of a three-member Board is disqualified or recused from participating on the merits of a case. The Board also noted that OLC's opinion does not distinguish between decisions that were pending at the time of the delegation of authority to the three-member Board and decisions that are submitted to the Board after the delegation and the departure of the third member.

The Employer would have me find that the four-Member Board acted unlawfully and improperly in designating as a quorum its two Members whose terms have continued. I am bound by the prior action of the Board, with which I agree. In this regard, the plain language of Section 3(b) of the Act, an interpretation endorsed by OLC's opinion, persuade me that the Board's designation was lawful and appropriate, and that it thus properly and effectively considered and denied the Employer's Request for Review. Accordingly, I overrule Objection No. 2.

Summary: Because I have decided that the Employer's two Objections lack merit and have overruled them, I shall issue a Certification of Representative in this matter absent a request

for review that the Board grants.[5]

DATED AT San Francisco, California this 25th day of March 2008.

/s/ *Joseph P. Norelli*

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[5] Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by April 8, 2008. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.